

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
BellSouth's Petition for Declaratory Ruling)	
Regarding the Commission's Definition of)	
Interconnected VoIP in 47 C.F.R. § 9.3 and the)	
Prohibition on State Imposition of 911 Charges on)	
VoIP Customers in 47 U.S.C. § 615a-1(f)(1))	WC Docket No. 19-44
)	
Petition for Declaratory Ruling in Response to)	
Primary Jurisdiction Referral, Autauga County)	
Emergency Management Communications District)	
Et al. v. BellSouth Telecommunications, LLC, No.)	
2:15-cv-00765-SGC (N.D. Ala))	

**COMMENTS OF
USTELECOM – THE BROADBAND ASSOCIATION**

USTelecom — The Broadband Association (USTelecom)¹ submits these comments² in support of BellSouth's common-sense positions set forth in its Petition for Declaratory Ruling,³ which are necessary to resolve unjustified litigation. First, the Commission should take this opportunity to continue its long-standing policy of promoting the IP transition by affirming that state/local 911 charges that apply disproportionately to Voice over Internet Protocol (VoIP) service—but not to functionally equivalent TDM services—inhibit adoption of IP products and are therefore preempted.⁴ This finding alone would moot the need for further Commission action on the Petitions. If needed, the Commission should adopt BellSouth's proposed clarifications

¹ USTelecom is the premier trade association representing service providers and suppliers for the telecom industry. Its diverse member base ranges from large publicly traded communications corporations to small companies and cooperatives – all providing advanced communications service to both urban and rural markets.

² Pleading Cycle Established for Comments on Petitions for Declaratory Ruling Filed by BellSouth and Alabama 911 Districts, Public Notice, WC Docket No. 19-44, DA 19-125 (WCB Feb. 26, 2019).

³ *BellSouth's Petition for Declaratory Ruling Regarding the Commission's Definition of Interconnected VoIP in 47 C.F.R. § 9.3 and the Prohibition on State Imposition of 911 Charges on VoIP Customers in 47 U.S.C. § 615a-1(f)(1)*, BellSouth Communications, LLC's Petition for Declaratory Ruling (filed Jan. 7, 2019) ("BellSouth Petition").

⁴ *Id.* at 23-26.

regarding VoIP services that would prevent the definition of VoIP from being applied in a nonsensible manner.⁵ The Commission, as the expert agency, must act quickly on this Petition to prevent the courts from unwittingly creating policies contrary to the Commission's.

I. THE LITIGATION UNDERLYING THE PETITION SEEKS TO EXPLOIT GOOD-FAITH TELECOM PROVIDERS IN ORDER TO ENRICH A PROFESSIONAL COMPLAINANT

It is important for the Commission to understand that the backdrop to the BellSouth Petition springs from litigation brought by a professional complainant seeking to exploit a twisted reading of the definition of VoIP services for personal gain. USTelecom firmly supports appropriately funding state 911 systems in order to improve public safety and reliability, but the underlying litigation does not advance that cause. Instead, the case at hand seems designed to enrich an individual seeking to win a game of “gotcha” by exploiting an (erroneous) technical claim in the definition of a service.

The BellSouth Petition reveals that litigation on these exact related points is widespread, drawing in five USTelecom members on substantially similar claims made by the same person across multiple states. Viewed in a vacuum, the legal dispute underlying the BellSouth Petition and Petition of the Alabama Districts,⁶ ostensibly brought to ensure that a telecom provider adequately complied with the relevant 911 statute funding the state's public safety program, may not raise such serious questions of motivation. However, when the same individual, Roger Schneider, owns companies participating either as a *qui tam* relator or contingency-fee consultant in all of the litigations with a potential payout of “as much as 40 percent of the additional 911

⁵ *Id.* at 12-22.

⁶ *Petition for Declaratory Ruling in Response to Primary Jurisdiction Referral, Autauga Cnty. Emergency Management Communication District et al. v. BellSouth Telecommunications, LLC, No. 2:15-cv-00765-SGC (N.D. Ala.)*, Petition of the 911 Districts of Autauga County, Calhoun County, Mobile County, and the City of Birmingham Regarding the Meaning and Application of the Definition of Interconnected VoIP Service Set Forth in 47 C.F.R. § 9.3 (filed Jan. 29, 2019) (“Alabama Districts Petition”).

charges that would be due from customers if his theories were accepted,”⁷ the Commission must seriously question the motivations underlying the dispute.

No one questions whether BellSouth, or any of the other roughly *30 telephone company defendants* in the cases that the Alabama, Florida, and Pennsylvania courts have stayed unjustly benefitted from the collection of 911 charges;⁸ the consultant instead has advanced his theory that *every one* of those telephone companies misinterpreted the nature of the services they provided so as to systematically short the 911 system across multiple states by millions of dollars (with the resultant potential to put millions in his pockets). The Commission should approach the Alabama Districts’ Petition, for which Mr. Schneider consulted, with an amount of skepticism commensurate to the blunderbuss nature of the allegations and the payout at stake for Mr. Schneider.

The Commission should also recognize the downstream costs of the Districts’ (and their consultant’s) effort to, in effect, make telephone companies strictly liable for errors in billing 911 charges, which would have a cascading effect to the detriment of consumers. Should the Districts (and their consultant) prevail, communications service providers would be forced to devote financial resources to paying in damages amounts that, based on a reasonable interpretation of law, policy, and technology, they never knew they needed to bill to or collect from their customers. It is axiomatic that you cannot spend the same dollar twice, and this drain on resources would necessarily come at the expense of network modernization and broadband deployment. The USTelecom members who have been targeted in these disputes are all participants in the Commission’s Connect America Fund program, through which they have committed to providing broadband service to millions of rural Americans, including those

⁷ BellSouth Petition at 1.

⁸ Alabama Districts Petition at 5 (“The Districts have not alleged that BellSouth wrongfully retained any of the 911 charges that it collected.”).

residing in the very states that are subject of dispute.⁹ This program is a continuation of these service providers' long-standing commitment serving to rural America, but unfair resource-draining disputes would call into question their ability to continue to do so, as these locations are by definition the least economic areas to serve.

II. SECTION 615a-1(f)(1) SHOULD BE INTERPRETED TO PREEMPT STATE STATUTES INHIBITING THE IP TRANSITION AS A MATTER OF LAW AND POLICY

The Commission, as part of its holistic assessment of the law and policies underlying these Petitions, should recognize that the positions advanced by the Districts (and their consultant) would have the effect of dragging the Commission backwards from where it has been marching on a bipartisan basis for much of the 21st century. Accepting the Districts' positions would undermine the IP transition and call into question the Commission's stance on 911 charge diversion as well. The Commission should accordingly interpret the Communications Act and its rules in the manner that is both straightforward and consistent with the Commission's longstanding policies, and in doing so, moot the need to further decide service definition issues.

A. The Commission Should Preempt State Statutes that Inhibit the IP-Transition

When Congress codified the Commission's *VoIP 911 Order*¹⁰ in 2008, it clearly expressed its desire to engender IP growth by including a preemption provision that "the [911] fee or charge [to subscribers of interconnected VoIP services] may not exceed the amount of any

⁹ BellSouth, via its parent company, AT&T, has committed to deploy broadband to more than 66,000 locations in Alabama alone via the CAF II Program. Similarly, CenturyLink has agreed to deploy to over 48,000 locations, Frontier has committed to 7300 locations, and Windstream over 1800 locations. In total the service providers subject to a variant of this litigation have agreed to invest in and deploy to over 125,000 locations in Alabama. *See* FCC, Connect America Fund Phase II Funding by Carrier, State, and County (2015) <https://www.fcc.gov/document/connect-america-fund-phase-ii-funding-carrier-state-and-county>.

¹⁰ *IP-Enabled Services, E-911 Requirements for IP-Enabled Services*, WC Docket Nos. 04-36, 05-196, First Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 10245 (2005).

such fee or charge applicable to the same class of subscribers to telecommunications services.”

47 U.S.C. § 615a-1(f)(1). Viewed in the appropriate context, Congress was directing the Commission to ensure that states do not discourage the growth of VoIP services through additional 911 charges that would make a VoIP service more expensive, and therefore, less attractive than the comparable non-VoIP service.

The Congressional direction to further the IP-transition is directly aligned with the Commission’s own bipartisan prioritization of the IP-transition. In 2004, years before the relevant preemption statute was in place, the Commission praised the potential of IP-enabled services to redefine the future of communications, and do so at a lower cost to consumers:

The changes wrought by the rise of IP-enabled communications promise to be revolutionary. These developments are expected to reduce the cost of communication and to spur innovation and individualization, giving rise to a communications environment in which offerings are designed not to fit within the limitations of a legacy network but rather to provide each end user a highly customized, low-cost suite of services delivered in the manner of his or her choosing. IP-enabled services generally – and VoIP in particular – will encourage consumers to demand more broadband connections, which will foster the development of more IP-enabled services. IP-enabled services, moreover, have increased economic productivity and growth, and bolstered network redundancy and resiliency.¹¹

In 2014, the Commission reinforced its desire to spur the IP transition, and its associated technological advances and cost efficiencies to consumers. The Commission explained in the *Technology Transitions Order* that, “[m]odernizing communications networks can dramatically reduce network costs, allowing providers to serve customers with increased efficiencies that can lead to improved and innovative product offerings and lower prices.”¹² Accordingly, the Commission strives “to position all the players—innovators (including those in existing lines of

¹¹ *IP Enabled Services*, WC Docket No. 04-36, Notice of Proposed Rulemaking, 19 FCC Rcd 4863, 4867 (2004).

¹² *Technology Transitions, et al.*, GN Docket No. 13-5, et al., Order et al., 29 FCC Rcd 1433, 1435 (2014) (*Tech Transitions Order*).

business), legacy service providers and manufacturers, *government regulators* and the general public—to prepare for, maintain, and facilitate the momentum of technological advances that are already occurring.”¹³

This theme of promoting the transition to IP services due, in part, to cost efficiencies, has continued under Chairman Pai. In the Commission’s 2017 *Business Data Services Order* it observed that, “[s]ubstitution between these two services [TDM and IP-Based] . . . is generally one directional. New customers, more likely than not, are choosing to purchase Ethernet services, subject to their availability and pricing, and existing customers of TDM-based service are switching to Ethernet.”¹⁴ The Commission goes on to note that this is exactly the outcome that the Commission desires. In finding that IP-based customers are not switching back to TDM services, it states that “[n]or as a policy matter would we want that to occur as the technology transition is moving towards the eventual termination of TDM service offerings altogether. We want to encourage that migration, while mitigating disruptions to existing customers, to help unleash the benefits of network innovation for American businesses and consumers.”¹⁵

If the Commission were to endorse the Alabama Districts’ claims about the meaning of § 615a-1(f)(1), it would directly undermine the Commission’s long-standing policy of promoting VoIP as a more cost-effective tool. The Alabama Districts’ Petition spends 10 pages arguing an issue that is not in dispute—that a state’s ability to tax voice communications services for 911 purposes has not been preempted by federal law.¹⁶ There is no disagreement with this position. The real crux of the matter is whether the State’s charge structure as applied to the VoIP services

¹³ *Id.* (emphasis added).

¹⁴ *Business Data Services in an Internet Protocol Environment et al.*, WC Docket No. 16-143 et al., Report and Order, 32 FCC Rcd 3459, 3471-72 (2017).

¹⁵ *Id.*

¹⁶ Alabama Districts Petition at 26-36.

in question is preempted because it increases the charges assessed on a VoIP service from the functionally-equivalent TDM service. The BellSouth Petition describes that under the Districts' reading of the Alabama law at issue, "a customer purchasing an ISDN PRI service that was actually VoIP (on the Districts' erroneous theory) would have to pay one 911 charge per telephone number, while customers purchasing a service that the Districts concede is ISDN PRI would have to pay only one charge per voice-capable channel."¹⁷ Under this scenario, due to the typical differences between the number of channels purchased and the amount of telephone numbers purchased (which would not vary between TDM and VoIP services), the VoIP customer would still end up paying many times the rate as the TDM customer.¹⁸

Any state law that mandated such a result should clearly be preempted as a matter of law and policy. If a customer incurs five times or more the number of charges by switching from a TDM to equivalent VoIP service—regardless if the "rate" remains the same from TDM to VoIP—then the "charge" for the VoIP clearly "exceeds the amount of such fee or charge applicable to the same class of subscribers of telecommunications services," which by statute it "may not" do.¹⁹ Preemption in this context is completely consistent with the goal of promoting VoIP services in order to allow "providers to serve customers with increased efficiencies that can lead to improved and innovative product offerings and lower prices."²⁰ It also aligns with the Commission's goal "to position all the players," including "government regulators," "to prepare for, maintain, and facilitate the momentum of technological advances that are already occurring"²¹ by removing a clear barrier to switching to VoIP services. Finally, preemption

¹⁷ BellSouth Petition at 23.

¹⁸ *Id.* at 24.

¹⁹ 47 U.S.C. § 615a-1(f)(1).

²⁰ *Tech Transitions Order* at 1435, para. 2 (2014)

²¹ *Id.*

removes any need for the Commission to make further decisions about the definition of VoIP services—decisions which may have unintended consequences given the regulatory history of the term—because the matter before the Commission would be resolved at that point. The only reason the Districts and the plaintiffs in these other litigations are asserting their interpretation of the Commission’s interconnected VoIP definition is because they also contend that VoIP customers must pay many more 911 charges than similarly situated non-VoIP customers — thereby inflating their claimed damages. A Commission ruling confirming that any such state statute that allows for such disparate 911 charges is preempted would eliminate the sole basis for the Districts’ and other plaintiffs’ novel and incorrect interpretation of the Commission’s rule.

B. Finding for the Districts (and Their Consultant) Would Amount to Sanctioned 911 Charge Diversion

The financial arrangements of the Districts and their consultant violate Congress’s and the Commission’s longstanding policy of discouraging states from diverting 911 charges towards other uses. Congress so detests 911 charge diversion that it requires the Commission to report to it annually “findings on the amount of revenues obligated or expended by each State or political subdivision thereof for any purpose other than the purpose for which any such fees or charges are specified.”²² Chairman Pai recently remarked that “[i]n light of the fact that [after 10 such reports] we still see states diverting funds, it’s clear that transparency alone isn’t enough to shame the offending states into doing the right thing. I’m ready and willing to work with Congress and other stakeholders to make sure that all public safety communications fees strengthen the public safety communications system.”²³ Similarly, Commissioners O’Rielly and Rosenworcel have

²² New and Emerging Technologies 911 Improvement Act of 2008, Pub. L. No. 110-283, 122 Stat. 2620 (2008) (NET 911 Act) (amending Wireless Communications and Public Safety Act of 1999, Pub. L. No. 106-81, 113 Stat. 1286 (1999) (Wireless 911 Act)).

²³ Ajit Pai, Chairman, FCC, Remarks at “911 Goes to Washington,” at 3 (Feb. 15, 2019) <https://docs.fcc.gov/public/attachments/DOC-356239A1.pdf>.

written that “diverting these funds makes it difficult for our nation’s 9-1-1 call centers to have the resources they need to keep their services up to date.”²⁴

Many of the similar cases in which Mr. Schneider serves as a either *qui tam* relator or a consultant take place in a state that has diverted funds, including New Jersey and Rhode Island.²⁵ While not directly relevant to the Alabama Districts, these cases are all related and the Commission’s decision on this topic will undoubtedly be applied in litigation in those charge diverting states. In this way, the Commission should be aware that finding for Mr. Schneider, the recurring element in this litigation, will embolden further 911 charge diversion because states will believe there’s an end-around for 911 charge recoveries based on taking advantage of legal loopholes. Further, the mere contingency fee arrangement associated with the type of fee structure Mr. Schneider has set up with the Alabama Districts—where he himself would be entitled to up to 40 percent of the 911 charges recovered—is diversion by another name. If those funds are truly required for 911 service under the technicalities of the Alabama statute, then the state should not be devoting such a staggering percentage to a consultant.

III. IF NECESSARY, THE COMMISSION SHOULD CONFIRM THE COMMON SENSE DEFINITION OF WHAT CONSTITUTES VOIP SERVICE

Should the Commission need to advance beyond the issue of preemption, the lynchpin of the Districts’ entire litigation is whether the services at issue are considered VoIP within the Commission’s definition of the service; if the services at issue are not VoIP, then the Alabama

²⁴ Letter from FCC Cmrs. Michael O’Rielly and Jessica Rosenworcel to the Hon. Bill Haslam, Chair, Rep. Governors Ass’n and Hon. Jay Inslee, Chair, Dem. Governors Ass’n, (July 31, 2018) *available at* <https://docs.fcc.gov/public/attachments/DOC-353114A1.pdf>.

²⁵ See FCC, *Tenth Annual Report to Congress on State Collection and Distribution of 911 and Enhanced 911 Fees and Charges*, at 43 (Dec. 17, 2018), <https://www.fcc.gov/file/14980/download>. The similar cases in New Jersey and Rhode Island are *Phone Recovery Servs., LLC and State of New Jersey v. Verizon New Jersey, Inc., et al.*, No. L 2257-13 (N.J. Super. Ct., Mercer Cnty.); and *Phone Recovery Servs., LLC and State of Rhode Island v. Verizon New England, Inc., et al.*, No. 2014-4059 (R.I. Superior Ct., Providence).

Districts cannot allege that BellSouth underpaid its 911 charge obligations. BellSouth in its Petition fully explains the common sense rationale that Voice over Internet Protocol must be transmitted and delivered over Internet Protocol, otherwise it simply cannot be Voice over Internet Protocol.²⁶ USTelecom embraces BellSouth's rationale in its entirety.

The Districts' positions on how a service that the customer orders as a TDM service and is delivered to the customer as a TDM service can be defined as a VoIP service are confusing at best. Other parties will undoubtedly explore why neither a point of demarcation nor the presence of customer premise equipment that is capable of receiving IP, but does not *require* IP for the finished service, renders a TDM service as VoIP.²⁷ USTelecom will simply observe that if a telecom service provider sells a service as TDM, the customer selects and purchases a TDM service, and the finished product to the customer is delivered in TDM, it stands to reason that both the carrier and the customer correctly believe a TDM service has been provided.

IV. CONCLUSION

For the forgoing reasons, USTelecom requests that the Commission find that the plain language of its definitions, its statutory mandates, and its well-established policies compels it to grant BellSouth's Petition for Declaratory Ruling.

Respectfully submitted,

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²⁶ BellSouth Petition at 12.

²⁷ See Alabama Districts Petition at 15-20.